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## More Than Mere Child's Play: International Parental Abduction of Children

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# More Than Mere Child's Play: International Parental Abduction of Children

*I read with interest this work on international parental child abduction which I found to be both thorough and informative.*

*The problem continues to increase in absence of world-wide ratification of conventions such as the Hague. Ignorance to the overwhelming scope and nature of the problem continues to be the biggest obstacle to finding solutions. For this reason, I found the work to be extremely important.*

*Over the past decade, progress has been made toward solving the complexity of problems arising from international parental child abduction. This is evidenced through the creation of the Uniform Child Custody Jurisdiction Act, The Parental Kidnapping Prevention Act of 1988, the 1979 European Convention, and the Hague Convention. This examination of the problem is comprehensive in scope while it also explores the existing solutions these laws and conventions offer. All of this is done in a clear and concise format which is both informative and useful to parents and assistance organizations.*

*I believe we are in a critical time for policy change regarding international parental child abduction, and I welcome the concern shown in this paper, as well as the good work.*

Foreword by Senator Alan J. Dixon\*

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\* Democrat, Illinois, member, Armed Services, Banking Housing and Urban Affairs, and Small Business Committees.

## I. Introduction

After or during divorce or separation, it is not uncommon for children to become the victims of custody disputes between their parents. The power struggles that follow the deterioration of a marriage often have devastating effects on the children.<sup>1</sup> These effects may be prolonged when, following divorce or separation, the noncustodial parent abducts the child in an attempt to gain physical custody.<sup>2</sup> The increasing frequency of such an occurrence has made the abduction of children by their parents a problem of national<sup>3</sup> and international concern.

This Comment examines both the legal responses of the United States and international community to this issue. In addition, this Comment demonstrates the operation of two international conventions that have been designed to address many of the problems traditionally associated with custody disputes involving the wrongful removal or retention of a child by a noncustodial parent. The final section of this Comment serves as an advisory tool for parents and attorneys who are cast into a situation where a child is taken from a foreign country to the United States or from the United States to a foreign country. As this Comment reveals, successful litigation of an international abduction case depends upon a thorough understanding of the legal mechanisms embodied in current international treaties. Where no treaty is in force, it is necessary to enlist the assistance of various legal and governmental organizations that offer services that respond to problems involving location of an abducted child, determination of applicable foreign law and obtaining of aid from foreign counsel.

## II. The Development of Parental Child Abduction Law in the United States

Long before child abduction by a parent emerged as an international issue, disputes in the United States arose out of the attempts of a non-custodial parent to obtain a favorable custody order by taking the child to another state and seeking relief in its courts. In the absence of law addressing the issues that accompany such disputes,

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1. The California Children of Divorce Project, a five-year study that surveyed immediate and long-range effects of divorce on American children, reveals that many of the participants reported that their parents' decision to divorce resulted in a sad and frightening childhood or adolescence. For a discussion of the results of the study, see C. WARE, *SHARING PARENTHOOD AFTER DIVORCE* 75-87 (1982).

2. The child's life, as a result of such an event, may be "... continually disrupted or threatened with disruption as his home, school, friends, and custodial parent change." S. KATZ, *CHILD SNATCHING* 11 (1981) [hereinafter KATZ].

3. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications*, 65 CALIF. L. REV. 978, 980 (1977).

inconsistent practices and decisions prevailed among the states. The status of the law changed, however, with the enactment of the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>4</sup> Federal legislation, embodied in the Parental Kidnapping Prevention Act,<sup>5</sup> followed the state legislation. A discussion of the principles and provisions that these bodies of law contain is necessary for they reappear in current treaties that respond to disputes in the international realm.

#### *A. Pre-Uniform Child Custody Jurisdiction Act*

The state of American child custody law prior to 1968 helped rather than hindered parental efforts to abduct or wrongfully retain a child.<sup>6</sup> The abundance of interstate custody cases and the occurrence of child snatching before enactment of the UCCJA may be traced to two factors:<sup>7</sup> various states possessed jurisdictional standards that encouraged relitigation of the same case,<sup>8</sup> and United States Supreme Court and state court decisions failed to establish a full faith and credit or comity standard with regard to original custody orders.<sup>9</sup>

1. *The jurisdiction factor.*—Prior to the adoption of the UCCJA, state courts could assume jurisdiction over the parties to a dispute on a number of grounds: physical presence of the child, personal jurisdiction over both parents, and domicile of the child.<sup>10</sup> These various jurisdictional bases enabled the courts of different states to assert jurisdiction over the parties.<sup>11</sup> A parent dissatisfied with the decree of one state court, therefore, could exploit the situation by removing the child to another state that possessed jurisdiction and possibly would render a more favorable decision.<sup>12</sup>

Before the existence of the UCCJA, a state, based upon the same grounds that established initial jurisdiction, was able to modify a prior custody decree of a sister state. Mere removal of the child from one state to another created a sufficient basis for modification of the decree.<sup>13</sup> The latter state, upon the basis of physical presence

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4. UNIF. CHILD CUSTODY JURISDICTION ACT 9 U.L.A. 111 (1968) [hereinafter UCCJA]. (This was enacted by all 50 states and the District of Columbia.)

5. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 [hereinafter PKPA].

6. P. HOFF, J. SCHULMAN & A. VOLENIK, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING 1-1 (1982) [hereinafter HOFF].

7. KATZ, *supra* note 2, at 34.

8. HOFF, *supra* note 6, at 3-1.

9. KATZ, *supra* note 2, at 34.

10. Note, *American and International Responses to International Child Abductions*, 16 N.Y.U.J. INT'L L. & POL. 415, 419 (1984) [hereinafter note].

11. *Id.*

12. HOFF, *supra* note 6, at 1-3.

13. *Id.* at 3-1.

of the child, could modify the existing decree.

2. *The full faith and credit factor.*—The full faith and credit factor<sup>14</sup> is closely linked to the jurisdiction factor. Because state court and Supreme Court decisions failed to set forth standards that compel courts to defer to the jurisdiction of the court that rendered the initial custody decision, state courts freely exercised jurisdiction regardless of the existence of a prior decree. Having asserted jurisdiction, the courts utilized broad discretion in refusing to recognize the determinations of another state or country.

a. *Decisions of the United States Supreme Court.*—Before the advent of the UCCJA, the Supreme Court adjudicated four interstate custody disputes: *People ex rel. Halvey v. Halvey*,<sup>15</sup> *Kovacs v. Brewer*,<sup>16</sup> *May v. Anderson*,<sup>17</sup> and *Ford v. Ford*.<sup>18</sup> Taken together these cases establish the federal approach<sup>19</sup> to the issue of full faith and credit for custody decrees.<sup>20</sup>

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14. Under art. IV, § 1, of the U.S. CONST., “. . . Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State.”

15. In the *Halvey* case, a Florida court granted a divorce and awarded custody of the child to the mother. Without the consent of the mother, the father removed the child to New York. The mother instituted habeas corpus proceedings in a New York court, which ordered that the mother retain custody of the child. The New York decision was affirmed on appeal to the Appellate Division and to the Court of Appeals. The case reached the Supreme Court on a petition for a writ of certiorari. 330 U.S. 610 (1953).

16. The *Kovacs* case involved a situation in which a New York court granted a divorce and awarded custody of the child to the parental grandfather, pending the father's discharge from the Navy. The child resided with the grandfather in North Carolina. The mother later sought, in the New York divorce court, modification of the divorce court's decree and award of custody of the child. The court modified its decree and granted custody to the mother. Following the grandfather's refusal to surrender the child, the mother filed suit in a North Carolina state court to enforce the custody award. The North Carolina court gave no effect to the New York decree and found that custody should remain in the grandfather. The decision was affirmed on appeal. The Supreme Court granted certiorari to consider the issue of full faith and credit. 356 U.S. 604 (1957).

17. In *May*, a father, in a Wisconsin *ex parte* divorce action, was awarded custody of the children. The mother refused to deliver to him the children, who were residing with her in Ohio. Following her refusal, the father filed a petition for a writ of habeas corpus in an Ohio court. The court ultimately decided that the Wisconsin decree was binding on the mother. The decision was affirmed on appeal. A later appeal to the Supreme Court of Ohio was dismissed. The Supreme Court granted certiorari. 345 U.S. 528 (1953).

18. *Ford* concerned a situation in which a father filed a petition for habeas corpus in a Virginia court requesting that custody of the children, who were residing with the mother in South Carolina, be awarded to him. Following negotiations, the mother and father agreed to share custody: the father was to have custody of the children during the school year and the mother was to have custody during summer vacation and other holidays. Nine months after dismissal of the case, the mother, while the children were visiting, initiated a suit for full custody in a South Carolina court. Focusing on the best interests of the children, the court decided that the mother should have custody of the children. Following appeals to the Court of Common Pleas and the Supreme Court of South Carolina, the U.S. Supreme Court granted certiorari to consider the issue of full faith and credit. 371 U.S. 187 (1962).

19. This approach has been described as a “hands off” approach. In 1981, however, the Supreme Court granted certiorari in a custody suit. For procedural reasons the Court declined to rule. See KATZ, *supra* note 2, at 56 and Webb v. Webb, 451 U.S. 493 (1981).

20. *Id.*

*Halvey* and *Kovacs* present the principle that a state's custody decree is entitled to full faith and credit in a second state only if jurisdiction was proper and circumstance have not changed such that a change of custody would be justified.<sup>21</sup> The Supreme Court reasoned that because state law permits a state to modify its own decree where circumstances have changed, another state's courts similarly should be able to modify the decree on the basis of changed circumstances.<sup>22</sup> Consequently, a dissatisfied parent, to obtain a favorable decree, simply could go to another state, submit himself or herself to its jurisdiction, and request modification on the basis of changed circumstances. The Supreme Court failed to address what constitutes a change in circumstances, thereby making it relatively easy for a parent to show change.<sup>23</sup>

The Supreme Court in *May* grappled with both the full faith and credit, and jurisdiction issues. Linking the two concepts, the Court held that where the court's jurisdiction in the original custody determinations was improper, the decree is not necessarily entitled to full faith and credit.<sup>24</sup> The Court offered various bases for the rationale of its decision. Justice Burton, who delivered the plurality opinion, emphasized interstate relationships and the importance of fulfilling the jurisdictional requirements set out in the opinion.<sup>25</sup> Justice Frankfurter, in his concurring opinion, stressed the best interests of the child, and viewed this factor as the primary concern in child custody disputes. He stated that ". . . the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."<sup>26</sup> Justice Jackson dissented, saying that the Court, by requiring personal service upon a parent before the domicile state of the other parent and the child may issue a custody order, creates a state of law "where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority . . . ."<sup>27</sup>

*Ford*, the final case in the set of major Supreme Court custody cases, also addressed the issue of full faith and credit. In reaching its decision as to whether a custody agreement negotiated by parents in Virginia was binding in South Carolina, the Court considered the

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21. *Id.*

22. *See* *People ex rel. Halvey v. Halvey*, 330 U.S. at 614 and *Kovacs v. Brewer*, 356 U.S. at 607-08.

23. *KATZ*, *supra* note 2, at 56.

24. *May v. Anderson*, 345 U.S. at 533-34.

25. For a more complete discussion of the Court's split on the reasoning of its decision, *see KATZ*, *supra* note 2, at 58.

26. *May v. Anderson*, 345 U.S. at 536.

27. *Id.* at 539.

principle of full faith and credit in conjunction with "res judicata."<sup>28</sup> According to the Court, unless a custody dispute has been resolved as a result of adjudication on the merits, the court of another state seeking to modify the initial custody decree is not bound by the prior resolution of the factual and legal issues.<sup>29</sup>

*b. Full faith and credit in the state courts*

1. *Interstate custody disputes.*—State court disputes, resolved in the wake of the Supreme Court decisions, reflected the absence of a full faith and credit standard. Its absence permitted state courts to exercise broad discretion in refusing to respect and enforce the custody decrees of other states.<sup>30</sup> Further, state decisions generally provided that when custody decrees of sister states are recognized, they can be modified whenever circumstances change.<sup>31</sup>

*Commonwealth ex rel. Thomas v. Gillard*<sup>32</sup> illustrates the way in which states treated custody decrees of other states prior to adoption of the UCCJA. Following the divorce of her parents, Renee Thomas remained in the custody of her mother in Philadelphia. Renee's father, without notice to her mother, took Renee to California to live with him. Following unsuccessful efforts by her mother to take her back to Philadelphia, Renee was placed in an institution, pending a child custody decree. A California court awarded the mother temporary custody of Renee, but later granted full custody to the father. Disregarding the California order, Renee's mother took her out of California and returned with her to Philadelphia. After initiating a custody suit in a Pennsylvania court, Renee's mother obtained custody of the child. The father appealed to the Supreme Court of Pennsylvania. The court affirmed the lower court's decision. While the court recognized that Pennsylvania applies a full faith and credit standard where a sister state has issued a custody decree, it also stated that if a Pennsylvania court possesses jurisdiction, it may exercise its independent judgment on the same facts that determined the foreign state's order.<sup>33</sup>

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28. "Res judicata" involves the concept that a matter, once judicially decided, is finally decided. See *Massie v. Paul*, 263 Ky. 183, 92 S.W.2d 11, 14.

29. The rationale underlying this decision involves the concern that without a trial on the merits, a judge may not be able to decide what will safeguard the welfare of the child. See *Ford v. Ford*, 371 U.S. at 193-94.

30. Note, *Law and Treaty Responses to International Child Abductions*, 20 VA. J. INT'L L. 669, 677 (1980).

31. In many situations, judges did their best to find that circumstances had changed. See *HOFF*, *supra* note 6, at 419.

32. 203 Pa. Super. 95, 198 A.2d 377 (1964).

33. The court offered the following factors as support for its decision: 1) the Commonwealth's interest in the child, 2) the welfare of the child, and 3) the fact that custody decrees are temporary in nature because they are subject to modification where circumstances have changed. *Id.* at 99, 198 A.2d at 379.

2. *International custody disputes.*—Prior to adoption of the UCCJA, American state courts accorded as little recognition to the custody decrees of foreign courts as they did to the decrees of sister states.<sup>34</sup> Theoretically, the American standard of comity<sup>35</sup> governs the recognition and enforcement of decrees of other countries. This standard, however, was not utilized in practice, since American courts often found reasons not to recognize foreign custody decrees.<sup>36</sup>

*State ex rel. Domico v. Domico*<sup>37</sup> illustrates that prior to adoption of the UCCJA, state courts did not apply comity principles, but made independent custody determinations based on what they believed was best for the child.<sup>38</sup> Following marital difficulties, a father removed his two children from West Germany to West Virginia. Upon discovering this, the mother filed suit in a West German court to obtain a custody order. The court issued an order awarding custody of the children to her. Later, divorce proceedings were conducted in Germany and a divorce decree was issued. The mother, in an effort to gain custody of her children, filed a habeas corpus petition in the Supreme Court of Appeals of West Virginia. After examining the circumstances, the court refused to honor the German decree on the ground that interests related to the welfare of the children demanded that their father be permitted to retain custody.<sup>39</sup>

Multiple jurisdictional bases and the absence of a uniformly applicable full faith and credit or comity standard combined to create a favorable environment for forum shopping and child snatching in interstate and international child custody disputes. These practices continued until the National Conference of Commissioners on Uniform State Law developed the UCCJA in an attempt to eliminate them.<sup>40</sup>

### B. *Uniform Child Custody Jurisdiction Act*

As revealed by the state of child custody law prior to enactment of the UCCJA, two factors operated to encourage interstate custody disputes and child snatching: 1) the exercise of jurisdiction by courts

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34. Note, *supra* note 10, at 420.

35. Comity is defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." 16 Am. Jur. 2d., *Conflict of Laws*, § 10.

36. Note, *supra* note 10, at 420.

37. 153 W. Va. 695, 172 S.E.2d 805 (1970).

38. Comment, *In Re: International Child Abduction v. Best Interests of the Child: Comity Should Control*, 18 U. MIAMI INTER-AM L. REV. 353, 360 (1970).

39. The Court emphasized that the children had completely adjusted to life in the United States, that they were well cared for in an adequate home provided by their father, and that their father's income was four or five times greater than the income of their mother who lived in Germany. 153 W. Va. at 704, 172 S.E.2d at 810.

40. Note, *supra* note 10, at 427.



of different states which rendered inconsistent decisions and 2) the failure of courts to grant full faith and credit to original custody decrees.<sup>41</sup> The UCCJA addresses these factors.

1. *The jurisdiction factor.*—The primary purposes of the UCCJA is to “avoid jurisdictional competition and conflict with courts of other states in matters of child custody . . . .”<sup>42</sup> To accomplish this purpose the UCCJA sets forth rules concerning whether a court has the jurisdiction to hear a custody case and to enter a valid order and whether a court may exercise that jurisdiction.<sup>43</sup>

a. *Initial jurisdiction.*—Before the advent of the UCCJA, courts typically exercised jurisdiction on the basis of either physical presence of the child within the state or on the domicile of the child in the state.<sup>44</sup> Enactment of the UCCJA altered prior custody jurisdiction law. The UCCJA produced three major modifications: it eliminated physical presence of the child as a basis for jurisdiction except in extraordinary situations,<sup>45</sup> it established “specific and limiting jurisdictional bases for initial decrees”<sup>46</sup> and it set forth additional jurisdictional limitations for modification of custody decrees.<sup>47</sup>

The principal “jurisdiction” section of the UCCJA is section

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41. KATZ, *supra* note 2, at 34.

42. Section 1 of the UCCJA states that the purposes of the Act are to:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

UCCJA, *supra* note 4, at 116-17.

43. HOFF, *supra* note 6, at 2-1.

44. *Id.* at 3-1.

45. *Id.*

46. *Id.*

47. *Id.*

3,<sup>48</sup> which sets forth the “initial” and “modification” jurisdictional standards that govern a court’s ability to enter a custody order. Under section 3, the primary bases for jurisdiction of a court to enter an initial custody decree or to modify an existing decree are “home state” and “significant connections” bases.<sup>49</sup> The Act vests initial jurisdiction in the courts in the child’s “home state,” which is defined as the “state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months . . . .”<sup>50</sup> The UCCJA also vests initial jurisdiction in the courts of a state in which the child and parent have significant connections.<sup>51</sup> If concurrent jurisdiction results under these bases, sections 6 and 7 provide that courts are to consider information about any other custody proceedings concerning the same child and, after communicating with each other, yield to the “appropriate forum.”<sup>52</sup>

Special circumstances may arise that prevent the application of

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48. Section 3 of the UCCJA provides:

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child’s home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (iii) it is in the best interests of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

UCCJA, *supra* note 4, at 122-23.

49. *Id.* at 122.

50. This is the definition presented in § 2(5). *See id.* at 119.

51. *Id.* § 3(a)(2), at 122.

52. For a discussion of the principles involved in sections 6 and 7 of the UCCJA, *see id.* at 134-35 and 139 (Commissioners’ note).

either home state or significant connections jurisdiction. According to UCCJA section 3(a)(3), a state must assume jurisdiction when a child is in need of immediate protection under the circumstances. This "parens patriae" jurisdiction ". . . exists when a child has been abandoned and in emergency cases of child neglect."<sup>53</sup> Additionally, section 3(a)(4) provides a subsidiary basis for jurisdiction that a court may resort to only when no other state can or will exercise jurisdiction under the other bases.<sup>54</sup>

*b. Modification jurisdiction.*—Sections 3<sup>55</sup> and 14<sup>56</sup> of the UCCJA govern modification jurisdiction. Section 14 provides that if a court in a state possesses jurisdiction under any of the section 3 requirements and does not decline to exercise jurisdiction to modify a decree it has previously rendered, other states ". . . shall not modify . . ."<sup>57</sup> that decree. Such a provision reinforces the jurisdiction of the original state to modify the decree and to prohibit other states from modifying its decree.<sup>58</sup>

*2. Full faith and credit or comity factor.*—Although the terms "full faith and credit" and "comity" do not appear in the text of the Act, the principles for which they stand pervade the UCCJA.<sup>59</sup> For example, the Commissioners' Note to section 13 states: "Although the full faith and credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them . . . . This section [13] declares as a matter of state law, that custody decrees of sister states will be recognized and enforced."<sup>60</sup> Under the Act, this treatment of prior

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53. *Id.* at 124 (Commissioners' note).

54. This subsidiary basis of jurisdiction will apply only if the best interest of the child would be served by the court's assumption of jurisdiction. *See id.* at 122.

55. *Id.* at 122-23. *See also supra* note 48.

56. Section 14 stipulates:

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to its in accordance with section 22.

*Id.* at 153-54.

57. *Id.* at 153.

58. HOFF, *supra* note 6, at 3-29.

59. KATZ, *supra* note 2, at 73.

60. UCCJA, *supra* note 4, at 151.

custody decrees is extended to international child custody disputes.<sup>61</sup>

3. *The UCCJA and international cases.*—Realizing that “. . . the basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved . . . from one country to another by feuding relatives,”<sup>62</sup> the Commissioners developed section 23<sup>63</sup> of the UCCJA. Through section 23, the basic principles of the UCCJA are applicable to international custody disputes and child snatching.<sup>64</sup> Pursuant to UCCJA policies, thus, American courts have declined to exercise initial and modification jurisdiction in various situations.<sup>65</sup> For example, where the foreign forum had closer connections with the child,<sup>66</sup> American courts have declined to exercise jurisdiction. Additionally, when the parent seeking to obtain custody has wrongfully removed the child to the United States, American courts have deferred to the jurisdiction of the foreign courts.<sup>67</sup>

While the UCCJA appeared to be the panacea for forum shopping and child snatching by a noncustodial parent, its deterrent effect was not infallible. *Brauch v. Shaw*<sup>68</sup> demonstrates the ineffectiveness of the Act in the context of an international custody dispute. In the *Brauch* case, a child was born out of wedlock to Ernest Brauch and Madeleine Shaw. After his birth, the child lived with Shaw in England. When the child was nine years old, he visited Brauch, who lived in the United States. Rather than returning the child to Shaw, Brauch provided a home for him in the United States. Shaw, who objected to such an arrangement, commenced legal proceedings in England to obtain custody of the child. The court made the child its ward and issued an *ex parte* ward order. On the same day that the court issued a second ward order, Brauch filed a petition for custody in a New Hampshire court. Following hearings, the

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61. *Id.* § 23, at 167-68.

62. *Id.* “The general policies of this Act extend to the international area.” *Id.* at 167.

63. Section 23 provides:

The general policies of this Act extend to the international areas. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

*Id.* at 167.

64. Note, *supra* note 10, at 428. *see also* Comment, *supra* note 38, at 362.

65. *See also* *In re Marriage of Ben-Yehoshva*, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (Cal. Ct. App. 1979) and *Woodhouse v. District Court*, 196 Colo. 558, 587 P.2d 1199 (1978).

66. Note, *supra* note 10, at 430.

67. As the Commissioners' Note to section 8 of the UCCJA explains, under the “clean hands” doctrine incorporated by the section, “. . . courts refuse to assume jurisdiction to reexamine an out-of-state custody decree when the petitioner has abducted the child or has engaged in some other objectionable scheme to gain or retain custody in violation of the decree.” UCCJA, *supra* note 4, at 142.

68. 121 N.H. 562, 432 A.2d 1 (1981).

New Hampshire court awarded temporary custody to Brauch and his wife. Shaw appealed to the Supreme Court of New Hampshire.

The court noted that the primary purpose of the UCCJA is to discourage ". . . both the unilateral removal of a child from his present home . . . and relitigation that shifts a child from jurisdiction to jurisdiction,"<sup>69</sup> yet upheld the lower court's exercise of jurisdiction over the custody dispute. The court rationalized the exercise of jurisdiction on the grounds that the child ". . . would have experienced the harmful effects of a disputed home environment . . ."<sup>70</sup> if the lower court had declined to exercise jurisdiction and the child had been shifted from New Hampshire to England.

*Brauch* reveals that broad trial court discretion under the UCCJA coupled with the absence of the requirement that states automatically render full faith and credit to existing decrees, dilutes the deterrent potency of the Act.<sup>71</sup> The second United States attempt to grapple with the problem of parental child snatching — the Parental Kidnapping Act of 1980 (PKPA) — sought to correct this and other weaknesses of the UCCJA.

### C. *The Parental Kidnapping Prevention Act of 1980*

The second major American effort to reduce the frequency of abductions in child custody disputes emerged in the form of federal legislation. The Parental Kidnapping Prevention Act of 1980 (PKPA)<sup>72</sup> articulates a purpose, "to deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards."<sup>73</sup> This purpose is reflected in three major provisions: a full faith and credit provision, a locator service provision, and a Fugitive Felon Act expansion provision.

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69. *Id.* at 571, 432 A.2d at 6 (citations omitted).

70. *Id.* at 573, 432 A.2d at 7.

71. Comment, *supra* note 38, at 363-64.

72. PKPA, *supra* note 5, at 3568.

73. Other purposes of the Act are to:

(1) promote cooperation between State [*sic*] courts to the end that a determination of custody and visitation is rendered in the State [*sic*] which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States [*sic*] which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States [*sic*];

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) avoid jurisdictional competition and conflict between State [*sic*] courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State [*sic*] to State [*sic*] with harmful effects on their well-being . . . .

*Id.* (Current version at 28 U.S.C.A. § 1738A (West Supp. 1987) (Congressional Findings and Declaration of Purposes for Parental Kidnapping Prevention Act of 1980)).

Under the full faith and credit provision, the PKPA requires that a state afford full faith and credit to the custody decree of a sister state that has met both state and federal jurisdictional criteria.<sup>74</sup> Once a custody determination has been made, it may not be modified unless the original state no longer has, or declines to exercise, jurisdiction and the modifying court possesses jurisdiction.<sup>75</sup>

Pursuant to the locator service provision, a parent may utilize the Parent Locator Service<sup>76</sup> to locate a child and/or a parent who has wrongfully taken the child.<sup>77</sup> The PKPA, through the Fugitive Felon Act expansion provision, offers another source of aid to parents of abducted children. The provision stipulates the congressional intention to apply the Fugitive Felon Act “. . . to cases involving parental kidnapping and interstate or international flight to avoid prosecution under applicable state felony statute.”<sup>78</sup> Therefore, where an “unlawful flight to avoid prosecution” situation arises in the context of a parental child-stealing case, the investigative resources of the Federal Bureau of Investigation may be available.<sup>79</sup>

While the PKPA contains several provisions that may assist a parent whose child has been wrongfully taken, application of these provisions is confined to cases arising within the United States; the PKPA is not applicable to international parental abduction disputes. Consequently, the second major attempt by the United States to deter parental abduction of children fails in the context of international disputes.

### III. International Responses to Parental Abduction of Children

By the 1960's, the judicial authorities in several European countries realized that it was necessary to develop a set of guidelines that would assist these countries when they faced international custody disputes. The 1961 Hague Convention represents the first international attempt to respond to this need; however, it also left many issues unresolved. In 1973, therefore, member nations of the Council

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74. The jurisdictional standards of the PKPA are similar to those of the UCCJA, with one major difference: the PKPA provides that a state decree issued on the basis of “significant connections” jurisdiction will be enforced only when no state qualifies as a “home state,” while the UCCJA permits the exercise of jurisdiction on the basis of either a “home state” or “significant connections” status. See PKPA, *supra* note 5, at 3571 (current version at 23 U.S.C.A. § 1738A(C)(2)(B) (West Supp. 1987)) and UCCJA, *supra* note 4, at 122.

75. PKPA, *supra* note 5, at 3571 (current version at 23 U.S.C.A. § 1738A(f)(West Supp. 1987)).

76. The Department of Health and Services maintains this service to locate parents who disobey support orders. Gelman, *Child Snatching: The New Parental Kidnapping Prevention Act*, 14 CLEARINGHOUSE REV. 1160 (1981). See also 42 U.S.C.A. §§ 653, 663 (West 1983).

77. *Id.*

78. PKPA, *supra* note 5, at 3573 (current version at 18 U.S.C.A. § 1073A (West Supp. 1987)). (Parental Kidnapping and Interstate or International Flight to Avoid Prosecution Under Applicable State Felony Statutes).

79. HOFF, *supra* note 6, at 8-24.

of Europe united to create a treaty, The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children,<sup>80</sup> which would respond more completely to the problem associated with international custody disputes. Several years later, the combined efforts of the United States and twenty-two other countries produced The Hague Convention On The Civil Aspects of International Child Abduction,<sup>81</sup> the most recent treaty regarding international child abductions that occur in the context of custody disputes.

#### A. *The 1961 Hague Convention*

Realizing that there was a need to protect the interests of children involved in international disputes, several countries<sup>82</sup> united to create the Convention Concerning the Power of Authorities and the Law Applicable in Respect of the Protection of Infants.<sup>83</sup> The Convention's stated purpose was "to establish common provisions on the powers of authorities and the law applicable in respect of the protection of infants . . . ."<sup>84</sup> Pursuant to this purpose, the Convention sets forth a jurisdictional standard based on habitual resident<sup>85</sup> of the child. This standard permits authorities of the State of the habitual residence of the child "to take measures directed to the protection of his person or property."<sup>86</sup> While this standard required recognition of the decisions of the state of the child's habitual residence, inadequacies of the Convention undermined its operation.<sup>87</sup> For example, although the Convention provided for recognition of foreign custody decrees, it did not stipulate that such decrees should be enforced.<sup>88</sup> Further, any positive effects of the Convention were lim-

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80. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, May 20, 1980, *reproduced in* 19 I.L.M. 273 [hereinafter European Convention].

81. Hague Convention On The Civil Aspect of International Child Abduction, Oct. 25, 1980, *reproduced in* 19 I.L.M. 1501 [hereinafter Hague Convention].

82. Signatories to the 1961 Hague Convention are: Australia, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Portugal, Switzerland, and Yugoslavia. See Note, *supra* note 30 at 689.

83. Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Oct. 5, 1961, U.N.T.S. 143 [hereinafter Convention for the Protection of Infants].

84. *Id.* at 145.

85. "Habitual residence" is equivalent to the American concept of domicile. Reese, *The Hague Draft Convention on the Recognition of Foreign Divorces*, 14 AM. J. COMP. L. 692, 693 (1967), cited in Foster and Freed, *The Hague Draft Convention on Recognition of Foreign Divorces and Separation*, 1 FAM. L.Q. 83, 84 (1967).

86. Convention for the Protection of Infants, *supra* note 83, at 145.

87. For example, Article 3 provides that the state of the child's habitual residence shall recognize a relationship between the child and authority ". . . which arises from the domestic law of the State of the infant's nationality." *Id.* at 147.

88. Jones, *Council of Europe Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children*, 30 INT'L. & COMP'V. L.Q. 467, 468 (1981).

ited, due to the fact that the signatory countries often disregarded the standards of the Convention and applied their own national law.<sup>89</sup> These deficiencies have caused the Convention to be deemed "a failure for not dealing at all with abductions of children in violation of an existing decree."<sup>90</sup>

### B. *The Strasbourg Convention of 1979*

A six-year effort on the part of the European countries constitutes the second international attempt to devise a solution to the problem of international parental child abduction.<sup>91</sup> The members of the Council of Europe united to design a European response to the problem and, in 1979, adopted a final draft, entitled European Convention of Recognition and Enforcement of Decisions Concerning Custody and on Restoration of Custody of Children.<sup>92</sup>

1. *Return of child and recognition and enforcement of pre-existing decrees.*—The Convention focuses primarily on the improper removal of children. An improper removal under the Convention is one that is in violation of a pre-existing custody determination.<sup>93</sup> Treatment of such a violation is set forth in two articles that address the return of an improperly removed child. Article 7 provides that a pre-existing custody decree of a contracting state "... shall be recognized and, where it is enforceable in the State of origin, made enforceable in every other Contracting State [*sic*]."<sup>94</sup> Article 8 presents the conditions that must exist before a child will be returned. First, the state that issued the the prior custody decree must be the one from which the child and parents derive their nationality. Second, the state must be one in which the child habitually resides. Last, within six months of the abduction, the parent seeking custody must submit a request to a central authority.<sup>95</sup>

2. *Central authorities.*—To reduce the obstacles that parties seeking to enforce decisions encounter, the Convention provides for

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89. These countries justified their actions on the basis of public policy or the treaty's emergency exceptions. See Note, *supra* note 30, at 689.

90. *Id.*

91. *Id.* at 690.

92. European Convention, *supra* note 80.

93. Article 1 states that improper removal also includes:

i. the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where custody is exercised;

ii. a removal which is subsequently declared unlawful within the meaning of

Article 12.

European Convention, *supra* note 80, at 274.

94. *Id.* at 276.

95. *Id.* See also *infra* text accompanying notes 96-100.



the creation of central authorities in contracting states.<sup>96</sup> The central authority is a judicial body or an administrative section in a government department to which a country delegates the task of reducing the practical difficulties associated with enforcing custody decrees.<sup>97</sup> Its primary role is as a conduit of incoming and outgoing requests for enforcement of a pre-existing custody determination.<sup>98</sup> The process operates such that if a proper request was sent from another country to a central authority, the authority would submit it to the proper court for registration.<sup>99</sup> If a challenge to registration arises, the court handles the challenge. If no challenge is raised or if a challenge is raised but rejected, registration and enforcement of the pre-existing order would follow.<sup>100</sup>

3. *Denial of recognition and enforcement of foreign decrees.*—Article 9 of the Convention provides that recognition and enforcement of a foreign decree may be denied under certain circumstances.<sup>101</sup> For example, the pre-existing decree will not be

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96. Jones, *supra* note 88, at 470.

97. European Convention, *supra* note 80, at 274. *see also* Jones, *supra* note 88, at 470.

98. Article 3(2) provides that:

the central authorities of the Contracting States:

a. shall secure the transmission of requests for information coming from competent authorities and relating to legal or factual matters concerning pending proceedings;

b. shall provide each other on request with information about their law relating to the custody of children and any change in that law;

c. shall keep each other informed of any difficulties likely to arise in applying the Convention and, as far as possible, eliminate obstacles to its application.

European Convention, *supra* note 80, at 274.

99. Jones, *supra* note 88, at 470.

100. *Id.* at 471.

101. Article 9 provides:

In cases of improper removal, other than those dealt with in Article [*sic*] 8, in which an application has been made to a central authority within a period of six months from the date of the removal, recognition and enforcement may be refused only if:

a. in the case of a decision given in the absence of the defendant or his legal representative, the defendant was not duly served with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence [*sic*]; but such a failure to effect service cannot constitute a ground for refusing recognition or enforcement where service was not effected because the defendant concealed his whereabouts from the person who instituted the proceedings in the State [*sic*] of origin;

b. in the case of a decision given in the absence of the defendant or his legal representative, the competence of the authority giving the decision was not founded:

i. on the habitual residence of the defendant, or

ii. on the last common habitual residence of the child's parents, at least one parent being still habitually resident here, or

iii. on the habitual residence of the child;

c. the decision is incompatible with a decision relating to custody which became enforceable in the State [*sic*] addressed before the removal of the child, unless the child has had his habitual residence in the terri-

recognized where the defendant in the original custody proceedings was not notified of the proceedings in time to prepare a proper defense.<sup>102</sup> Neither will the foreign decree be enforced if the "habitual residence" condition of article 8 is not met.<sup>103</sup> Additionally, "unless the child maintained habitual residence in the State [*sic*] requesting enforcement for one year prior to abduction . . ."<sup>104</sup> the state receiving the request will enforce the decree only if the decree ". . . does not conflict with any decisions of the enforcing State [*sic*] made prior to the abduction."<sup>105</sup>

Article 10 presents additional grounds for denying recognition and enforcement of foreign decisions.<sup>106</sup> Among these grounds are where the circumstances have changed such that return of the child would be contrary to his welfare,<sup>107</sup> where the decision is incompatible with fundamental legal principles by which the enforcing state abides,<sup>108</sup> and where closer connections exist between the child and the enforcing state than between the child and the requesting state.<sup>109</sup> Pursuant to article 17,<sup>110</sup> a state may reserve the right to utilize any one of the article 10 grounds when confronted with custody decree cases.<sup>111</sup>

The Convention responds to many matters<sup>112</sup> that were obstacles to parents prior to its creation; the limitations and exceptions contained in articles 7, 8, 9, and 10, however, may undercut the relief which the Convention seeks to offer. Where, for example, a prior

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tory of the requesting State [*sic*] for one year before his removal.

2. Where no application has been made to a central authority, the provisions of paragraph 1 of this Article [*sic*] shall apply equally, if recognition and enforcement are requested within six months from the date of the improper removal.

European Convention, *supra* note 80, at 276.

102. *Id.*

103. Generally, the prior decision must be based upon the habitual residence of the defendant or child. The decision may, however, be founded on the last common habitual residence of both parents if at least one still lives there. *Id.*

104. Note, *supra* note 30, at 691.

105. *Id.*

106. European Convention, *supra* note 80, at 277.

107. *Id.*

108. *Id.*

109. *Id.*

110. Article 17 provides that "A Contracting State [*sic*] may make a reservation that, in cases covered by Articles [*sic*] 8 and 9 or either of these Articles [*sic*], recognition and enforcement of decisions relating to custody may be refused on such of the grounds provided under Article [*sic*] 10 as may be specified in the reservation." European Convention, *supra* note 80, at 279.

111. Jones, *supra* note 88, at 438.

112. Among these matters are:

- (a) the tracing of the child's whereabouts;
- (b) the procurement . . . of the services of a lawyer in a second State [*sic*];
- (c) the authentication of the applicant's claim . . .
- (d) the filing of an early date for the giving of a decision; and
- (e) procuring the enforcement of a decision when it is rendered.

*Id.* at 472.

custody decision does not exist,<sup>113</sup> or the nationality or habitual residence requirement of article 8 is not met,<sup>114</sup> or a development following the initial decision has altered the original situation,<sup>115</sup> the mechanisms of the Convention may not be available.

### *C. The Hague Convention on the Civil Aspects of International Child Abduction*

Prior to 1976, United States efforts in the area of parental kidnapping targeted interstate disputes. The United States responded to public concern over parental abduction with two major bodies of law: the state-enacted UCCJA<sup>116</sup> and the congressionally-enacted PKPA.<sup>117</sup> Neither of these Acts, however, focused on problems associated with international parental abduction.<sup>118</sup> Consequently, a parent whose child was wrongfully removed to or retained in another country had no choice but to surrender to the applicable laws and procedures that existed in the country in which the child was found.<sup>119</sup> This dilemma was recognized at a 1976 Hague Conference Special Commission meeting, when it was proposed that the Conference prepare a treaty that addresses parental kidnapping in the international realm.<sup>120</sup> In addressing such a problem, the primary objective was ". . . to spare children the detrimental emotional effects associated with transnational parental kidnapping."<sup>121</sup> Thirty-six countries<sup>122</sup> participated in an international effort to produce a Convention that would serve to deter international parental abductions of children and to restore the legal situation to the status quo prior to the abduction.<sup>123</sup> By 1980, their combined efforts produced the Hague Convention on the Civil Aspects of International Child Abduction.<sup>124</sup>

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113. Eekelaar, *International Child Abduction by Parents*, 32 U. TORONTO L.J. 281, 322 (1982)[hereinafter Eekelaar].

114. *Id.*

115. Jones, *supra* note 88, at 73.

116. UCCJA, *supra* note 4.

117. PKPA, *supra* note 5.

118. Letter of Submittal of Hague Convention to Senate, S. REP. NO. 25, 99th Cong., 2d Sess. 5 (1985).

119. *Id.*

120. *Id.*

121. *Id.*

122. The nations include: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Yugoslavia, Luxembourg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and representatives of the government of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer. Hague Convention, *supra* note 81, at 1501.

123. Note, *supra* note 10, at 440.

124. Eekelaar, *supra* note 113, at 305.

The preamble to the Convention reveals the premises upon which the Convention rests. First, in matters relating to custody, the interests of children are of paramount importance. Last, in light of these interests, it is necessary to establish procedures that will ensure the prompt return of children to the country where they habitually resided prior to their removal.<sup>125</sup> The Convention sets forth rules which reflect these premises. Generally, these rules require that a child who is wrongfully removed to a foreign country or retained abroad be returned promptly to the country in which he or she habitually resides.<sup>126</sup>

1. *Scope of Convention.*—Under article 1 and 2,<sup>127</sup> contracting states are obligated to take appropriate measures to implement the Convention's objectives as follows: "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State [*sic*]; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>128</sup>

Article 3 addresses those removals or retentions that are considered wrongful for the purpose of the Convention. Under article 3, removals or retentions that are wrongful are those that are "in breach of rights of custody,"<sup>129</sup> held "either jointly or alone," which "at the time of removal or retention . . . were actually exercised . . . or would have been so exercised but for the removal or retention."<sup>130</sup>

While the scope of the Convention does encompass children who are wrongfully removed or retained, it does not extend to all children who are so victimized.<sup>131</sup> Before the administrative and judicial mechanisms of the Convention may be applied, therefore, it is necessary to inquire whether or not the abducted or retained child is subject to the Convention's provisions.<sup>132</sup>

Article 4 provides that the Convention applies to children who are under the age of sixteen. The Convention cannot be utilized as a means for securing return of a child once the child reaches sixteen.<sup>133</sup> The Convention also provides that the wishes of mature chil-

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125. Hague Convention, *supra* note 81, at 1501.

126. Note, *supra* note 10, at 441.

127. Hague Convention, *supra* note 81, at 1501.

128. *Id.*

129. *Id.*

130. *Id.* See also Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 104 (1980) [Bodenheimer].

131. S. REP. NO. 25, 99th Cong., 2d Sess. 8 (1986).

132. This means that "even if a child is under sixteen at the time of the wrongful removal or retention as well as when the Convention is invoked, the Convention ceases to apply when the child reaches sixteen." *Id.*

133. Hague Convention, *supra* note 81, at 1501. See also S. REP., *supra* note 131, at 8.

dren regarding their return may be considered by the judicial authority. Therefore, although the Convention is applicable because a child is under sixteen, the judicial authority may refuse to order the return of the child if he or she ". . . objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of . . . [his or her] views."<sup>134</sup> In addition to an age requirement, article 4 presents a residence requirement. Thus, for the Convention to apply, the child must have been ". . . habitually resident in a Contracting State [*sic*] immediately before any breach of custody or access of rights."<sup>135</sup>

Once a child is within the ambit of the Convention, the existence of a custody order concerning the child cannot withdraw the protection which it affords.<sup>136</sup> Article 17<sup>137</sup> provides that a state cannot, on the basis of the existence of a court order awarding custody to the alleged wrongdoer, refuse to return a child.<sup>138</sup>

Wrongfully removed or retained children are protected by the Convention, even in the absence of a prior custody order. To utilize the return mechanisms of the Convention, one need not show that a prior custody decree exists.<sup>139</sup> Invocation of the Convention is permitted in pre-decree situations as well as in the context of abductions in violation of existing custody decrees.<sup>140</sup>

2. *Administrative assistance: Creation of Central Authorities.*—Under article 6, the contracting state is required to designate a central authority to serve four major functions.<sup>141</sup> The central authority is empowered to accept and transmit applications for the return of children, assist in locating children, promote amicable custody and visitation settlements, and assist applicants in obtaining legal counsel.<sup>142</sup> Before legal proceedings are commenced, central authorities must pursue voluntary return of the wrongfully removed

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134. Hague Convention, *supra* note 81, at 1502.

135. *Id.* at 1501. *see also* S. REP., *supra* note 131, at 103.

136. S. REP., *supra* note 131, at 13.

137. Article 17 provides:

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State [*sic*] shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State [*sic*] may take account of the reasons for that decision in applying this Convention.

Hague Convention, *supra* note 81, at 1503.

138. *Id.*

139. S. REP., *supra* note 131, at 13.

140. *Id.*

141. Bodenheimer, *supra* note 130, at 105.

142. Article 7 sets forth the specific "appropriate measures" that central authorities are obligated to take when attempting to secure the return of a child. *See* Hague Convention, *supra* note 81, at 1502.

or retained.<sup>143</sup>

3. *Return of the child.*—Once a person's<sup>144</sup> custody rights have been violated by the wrongful removal or retention of his or her child by another,<sup>145</sup> he or she may, under articles 8 and 12, exercise one of two options in order to activate the return mechanisms of the Convention.<sup>146</sup> First, he or she may apply directly to a court in the contracting state to which the child has been removed or in which the child is being retained. Alternatively, he or she may apply to the central authority of the child's habitual residence or other contracting state where the child is thought or known to be located.<sup>147</sup>

If the petition for return is made directly to the judicial authority in the contracting state where the child is located, the court's function is not to decide who should have custody, but whether there has been a wrongful removal or retention.<sup>148</sup> If there has been such a breach of rights and return proceedings are commenced less than one year from the date of wrongful removal or retention, the court is required to order the immediate return of the child.<sup>149</sup> If, however, commencement of return proceedings occurs a year or more after the removal or retention, the court still must order return of the child unless evidence is presented showing that the child is settled in his or her new environment.<sup>150</sup>

Where a person applies to the central authority of a contracting state, the authority, upon receipt of such application, may decline to proceed further if it finds that the application is not within the scope of the Convention or it is otherwise ill-founded.<sup>151</sup> If the authority accepts the application, there are several methods of proceeding. No matter what method is selected, however, foremost in the mind of the authority should be the article 10 requirement<sup>152</sup> that it "... take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."<sup>153</sup>

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143. Bodenheimer, *supra* note 130, at 105.

144. The term "person" is used to simplify the discussion of the Convention. The Convention, however, addresses the custody rights of a person, an institution, or any other body. Hague Convention, *supra* note 81, at 1501.

145. S. REP., *supra* note 131, at 25.

146. *Id.* at 26.

147. *Id.* For a more detailed discussion of these procedures, see Eekelaar, *supra* note 113, at 316-18.

148. No decision is made on the merits. The court simply determines if there has been a wrongful removal or retention. See Bodenheimer, *supra* note 130, at 106.

149. S. REP., *supra* note 131, at 27. Additionally, Article 11 of the Hague Convention provides that return proceedings are expected to be completed within six weeks. Hague Convention, *supra* note 83, at 1502.

150. S. REP., *supra* note 131, at 27.

151. Eekelaar, *supra* note 113, at 317.

152. *Id.*

153. Hague Convention, *supra* note 81, at 1502.

4. *Exceptions to the return requirement.*—As mentioned above, under article 12, where a person has applied to a court in a contracting state and has initiated return proceedings less than one year after the wrongful removal or retention, the court shall order the immediate return of the child.<sup>154</sup> Articles 13 and 20 recognize limited exceptions to the article 12 return requirement.<sup>155</sup>

Article 13 sets forth three bases for refusing to return the child: 1) the person taking care of the child “. . . was not actually exercising the custody rights at the time of removal . . .,” 2) the person taking care of the child “. . . consented to or subsequently acquiesced in the removal or retention . . .,” or 3) “. . . there is a grave risk that . . . [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>156</sup>

In addition to the grounds set forth in article 13, under article 20,<sup>157</sup> return may be refused if the court finds that return of the child “. . . would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.”<sup>158</sup>

As the preceding discussion indicates, the 1979 European Convention and the 1980 Hague Convention offer relief to victimized parents by establishing legal mechanisms by which parents may obtain enforcement of a prior custody order and return of an abducted child. Before seeking recourse through utilization of the Conventions, however, parents and attorneys must recognize and understand the limitations and exceptions that exist.

#### IV. Case Studies: Operation of the 1979 European Convention and the 1980 Hague Convention

Complete understanding of the legal mechanisms embodied in the European Convention and the most recent Hague Convention is best facilitated by application of these Conventions to hypothetical cases. These cases illuminate pitfalls of both the European and Hague Conventions.

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154. S. REP., *supra* note 131, at 27.

155. Note, *supra* note 10, at 443.

156. Article 13 also provides that when the judicial and administrative authorities consider circumstances that may prevent return of the child, they “. . . shall take into account the information relating to the social background of the child provided by the Central Authority [*sic*] or other competent authority of the child’s habitual residence.” Hague Convention, *supra* note 181, at 1502-1503.

157. Eekelaar, *supra* note 113, at 311.

158. Hague Convention, *supra* note 81, at 1503.

### A. *Operation of the European Convention*

Assuming that the European Convention is in force, in the first example two French citizens marry and later reside in France. During their second year of marriage the wife gives birth to a baby boy. Several years later the French couple experience marital difficulties. Consequently, the marriage deteriorates and the couple obtain a divorce decree from a French court. Pursuant to an accompanying custody order, the mother retains custody of the son. One year after the divorce, while the boy is visiting his father, he is moved to Spain.

Application of the Convention's provisions to this situation is straightforward. France is both the state of nationality of the child and parents, and the state of the child's habitual residence. Two of the three conditions necessary to trigger automatic return are therefore met.<sup>159</sup> To fulfill the final requirement under article 8, the mother need only submit to the central authority in Spain a request to enforce the custody decree within six months of the son's removal.<sup>160</sup> The central authority then would transmit the request to the proper court for registration.<sup>161</sup> After receiving the request the court would register and enforce the decree. Such enforcement would compel return of the child.<sup>162</sup>

Yet if more complicated circumstances exist the situation under the Convention is less straightforward. Suppose that the French woman married a Spaniard, not a Frenchman, and that no custody decree exists. As a result of these factual modifications, the French mother faces a more formidable situation. Automatic return is no longer a possibility because the nationality requirement is not met.<sup>163</sup> Additionally, the Convention is designed to address post-decree cases, therefore, before the French woman may utilize the Convention to secure her son's return, she must obtain a decree or a "chasing order." Such a task may prove to be difficult, if not legally impossible to accomplish, because the boy is not present in France.

As demonstrated by these hypothetical cases, the European Convention is useful where a parent seeks return of an abducted child under simple circumstances. It is ineffective, however, or even inaccessible, where complex circumstances arise.

### B. *Operation of the Hague Convention*

In the context of the Hague Convention the following situation may arise. Two residents of New York marry and settle in the Lake

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159. See *supra* text accompanying note 95.

160. *Id.*

161. See *supra* text accompanying notes 102-04.

162. *Id.*

163. See *supra* text and accompanying note 95.



Placid area of New York. Two years later, they have a daughter. Subsequently, the marriage becomes unstable and the husband seeks a divorce. The couple later obtains a divorce decree from a New York court. Pursuant to the court's determination, the mother retains custody of the daughter. After the divorce, during a visit with her father, the four-year-old child is taken by her father to Ontario, Canada.

Under these circumstances, operation of the Hague Convention is simple. The child falls within the protection afforded by the Convention because the age, wrongful removal or retention, and habitual residence requirements are fulfilled as follows: 1) the child is under sixteen years of age, 2) the child's father removed her to Canada in breach of his access rights and 3) the child was habitually resident in New York immediately before such breach.<sup>164</sup> Since the conditions which permit application of the Convention are met, the mother, to trigger restoration of her child to her custody, either may apply to the central authority in New York or she may bypass the central authority and apply directly to a Canadian court.<sup>165</sup>

If the mother applies<sup>166</sup> to the central authority of either country, the authority, upon receipt of her application, is bound to seek voluntary return of the child. If these efforts should fail, the authority would institute proceedings for return of the child. If instead, the mother applies directly to a Canadian court, the court would render a decision declaring whether or not the removal is wrongful. Where the removal is declared wrongful, as it should be declared in this case, the court would order the immediate return of the child.<sup>167</sup>

In contrast to the above factual situation, where the facts are more complicated, the operation of the Convention is less straightforward. For example, assume that rather than seeking a divorce, the husband agrees to a separation and permits his wife to retain custody of the child and that after the separation the wife suffers from depression and becomes careless in her duties as a mother. While the return requirements remain fulfilled, the fact that the wife has become delinquent in undertaking her responsibilities as a mother may provide a basis for refusing to return the child. Such refusal is appropriate under the exception that permits refusal where ". . . there

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164. See *supra* text and accompanying notes 129-35.

165. See *supra* text and accompanying notes 144-53.

166. The mother must provide the following information:

. . . a/ identity of applicant, child and alleged abductor;

b/ where available, the date of birth of the child;

c/ the grounds on which the claim for return is based; [and]

d/ all available information relating the whereabouts of the child and the identity of the person with whom the child is presumed to be.

See Eekelaar, *supra* note 113, at 317.

167. See *supra* text accompanying notes 148-50.

is a grave risk that . . . return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."<sup>168</sup> Unlike a parent seeking to utilize the European Convention, however, the mother need not obtain a decree of "chasing order" before seeking relief under the Hague Convention because the Convention applies equally to pre-decree and post-decree custody cases.

As revealed by the preceding hypothetical situations, once the Conventions are fully implemented, they will serve as valuable, but not infallible, tools to parents seeking enforcement of prior custody decrees and return of abducted children. Effective utilization of these tools, however, requires a thorough comprehension of the limitations and exceptions which accompany their use.

#### V. Litigating a Foreign Abduction Case: Pitfalls and Recommendations

The foregoing hypotheticals demonstrate the European and Hague Conventions in operation. The Conventions are in force, however, in relatively few countries.<sup>169</sup> While international legal mechanisms for obtaining enforcement of a prior custody decree and return of an abducted child exist, therefore, such mechanisms are impotent without widespread implementation. Until the European and Hague Conventions are fully implemented parents and lawyers must rely on existing law.<sup>170</sup>

The successful litigation of an international case involving parental abduction<sup>171</sup> of a child encompasses many issues.<sup>172</sup> They include: what law is applicable in the country from which the child was abducted, how to find and apply foreign law, how to locate foreign lawyers, and what legal status is given to foreign custody decrees where a prior custody decree is involved.<sup>173</sup>

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168. See *supra* text accompanying note 156.

169. The European Convention has been ratified by the following countries: Austria, Belgium, Cyprus, France, Luxembourg, Portugal, Spain, and Switzerland. The Hague Convention has been ratified by the following countries: Australia, Canada (most provinces), France, Hungary, Luxembourg, Portugal, Switzerland, and the United States (with regard to the United States, legislation aimed at putting in place the Hague Convention—51347—will be voted upon by the Senate and House of Representatives in late March, 1988. Telephone interview in March, 1988, with Brian Hanson, Legislative Assistant to Senator Dixon). Cretney, *Child Abduction: the New Law*, 130 SOLIC. J. 827, 828 (1986).

170. Crouch, *International Child-Snatching* 9 FAM. ADVOC. 17 (1987) [hereinafter Crouch].

171. *Id.*

172. *Id.*

173. *Id.*

*A. When a Child Has Been Taken to the United States: Applicable U.S. Law*

All fifty states have adopted the UCCJA, with some variation.<sup>174</sup> International custody disputes are addressed, under the UCCJA, through section 23, which provides that the Act's general policies extend to international cases.<sup>175</sup> Where a parent has wrongfully taken a child to the United States in order to petition an American court to obtain custody of the child, the aggrieved parent should invoke section 23 of the UCCJA. Pursuant to the principles of this UCCJA section, if the foreign forum possesses jurisdiction under its own law, an American court should defer to such jurisdiction.<sup>176</sup> Further, if the abducting parent is seeking modification of a foreign custody decree, an American court should decline to exercise jurisdiction where there has been reasonable notice and an opportunity to be heard in foreign proceedings.<sup>177</sup> An additional factor that will support deference to the foreign forum's original or modification jurisdiction is the existence of closer connections between the foreign forum and the child and his or her parents, than between the United States and the parties involved.<sup>178</sup>

*B. When a Child is Taken to a Foreign Country from the United States*

Fortunately for the parent whose child has been taken by the noncustodial parent to the United States, the United States possesses laws<sup>179</sup> that accord recognition to foreign custody orders. This situation greatly differs, however, when a child is taken to another country from the United States. Presently, there are no treaties in force on the topic between the United States and other countries. Recognition of American custody orders and assistance offered to American parents, therefore, varies from country to country.<sup>180</sup>

Unless the law of the country to which a United States child has been taken has provided for recognition and enforcement of foreign custody decrees,<sup>181</sup> the foreign court will utilize its own substan-

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174. See *supra* text accompanying note 64.

175. Note, *supra* note 10, at 428.

176. Crouch, *supra* note 170, at 18.

177. Note, *supra* note 10, at 429. See the following for custody cases in which American courts have deferred to the jurisdiction of a foreign forum: *In re Marriage of Ben-Yehoshva*, 91 Cal. App.3d 259, 154 Cal. Rptr. 80 (Cal. Ct. App. 1979) and *Woodhouse v. District Court*, 196 Colo. 558, 587 P.2d 1199 (1978).

178. UCCJA, *supra* note 4 at PKPA, *supra* note 5.

179. Dehart, *Getting the Child Back*, 9 FAM. ADVOC. 22 (1987) [hereinafter Dehart].

180. A few countries have addressed the issue of the recognition that should be given to foreign custody decrees. For example, France and Hungary have instructed their courts to recognize and enforce the decrees of the United States that have adopted a variation of the UCCJA that includes section 23, the foreign applicability section. See *id.* at 22.

181. Crouch, *supra* note 170, at 18.

tive and procedural law when resolving a custody dispute, even if both parents are United States citizens.<sup>182</sup> If a parent is fortunate, the foreign court may decline to apply foreign law on the basis that the dispute could best be resolved according to the law of the parties' own American domicile.<sup>183</sup> Where this does not occur, it may be argued that the foreign country may recognize an order of a United States court under the concept of *de facto* reciprocity.<sup>184</sup> Such a concept provides that the United States order will be recognized if an order from the foreign country would be enforced in the United States.<sup>185</sup> *De facto* reciprocity may be established through the use of section 23 of the UCCJA. Legal counsel, however, must bring an action to establish such judgment.<sup>186</sup>

The concept of comity<sup>187</sup> provides an alternative basis for recognition and enforcement of an existing foreign custody decree.<sup>188</sup> It is likely, however, that a foreign court which claims that it will afford great deference to the American decree, actually will examine the facts of the case independently.<sup>189</sup> In the majority of cases, therefore, foreign law will be applied.

1. *Finding applicable foreign law.*—Where foreign law will be applied, locating the applicable law may pose a problem.<sup>190</sup> U.S. attorneys should seek the assistance of the various legal divisions of the Library of Congress when trying to determine the nature of the foreign law. Another source of applicable foreign law is the foreign forum's embassy or consulate.<sup>191</sup> These sources provide assistance in obtaining research services and/or copies of relevant statutes.

2. *Locating foreign attorneys.*—Another possible problem, in litigating is enlisting the aid of foreign counsel. A United States service that provides assistance to persons trying to locate foreign attorneys is the Office of Citizens Consular Services.<sup>192</sup> Other possible sources of help include: the International Bar Association,<sup>193</sup> the In-

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182. *Id.*

183. *Id.*

184. Dehart, *supra* note 180, at 23.

185. *Id.*

186. *Id.* See also Nichols, *Recognition and Enforcement: American Courts Look at Foreign Decrees* 9 FAM. ADVOC. 9 (1987).

187. Dehart, *supra* note 180, at 23.

188. Crouch, *supra* note 170, at 18.

189. Such a problem is intensified when the foreign country has a federal system in which the law concerning custody matters varies among its states or provinces. *Id.*

190. *Id.*

191. To obtain a list of foreign attorneys, contact the Office of Citizens Consular Services, State Dept., Rm. 4817 N.S., Washington, D.C. 20520.

192. International Bar Association: 2 Harewood Pl., Hanover Square, London W1R 2HB, England.

193. Inter-American Bar Association: 1889 F Street, Suite 450, Washington, DC 20006.

ter-American Bar Association,<sup>194</sup> and the International Society of Family Law.<sup>195</sup> Where the testimony or affidavit of a foreign attorney is necessary to explain the United States decree or to confirm its validity, embassies and consulates may be able to offer assistance.<sup>196</sup>

3. *Locating the abducted child.*—A parent often does not know the location of the child. Once again, the Office of Citizens Consular Services provides assistance to the aggrieved parent. Based upon information<sup>197</sup> provided by a parent, a consular officer may locate the abducted child.<sup>198</sup> If search efforts are futile, the consular officer will seek verification of the child's entry and residence in a foreign country.<sup>199</sup> When such information has been verified the consular officer, with the permission of the United States parent, will attempt to contact the child.<sup>200</sup>

4. *"Re-snatching" the Child.*—Utilization of self-help measures to regain custody of the child is not advisable. The consequences may be severe: a parent attempting to "re-snatch" the child may be arrested or the child's life may be endangered.<sup>201</sup> In addition, once the parent regains custody following a re-snatching attempt, the United States embassy or consulate can offer neither assistance nor refuge to a parent who, by such action, violates local law.<sup>202</sup>

5. *Steps to Deter Abduction.*—As demonstrated by the preceding discussion, until the Hague Convention is ratified by the United States and United States parents may utilize it, obtaining the return of an abducted child may prove to be a formidable task. Steps may be taken in advance, however, to deter abduction by a noncustodial parent. For example, the attorney handling the original custody dispute should ensure that the custody order precludes removal of the child from the United States and stipulates that such removal constitutes contempt, a crime for which the abducting parent may be

194. International Society of Family Law: Fitzwilliam College, Cambridge CB3 ODG, England.

195. For example, embassies and consulates may obtain for an attorney an authoritative official translation of the decree. Crouch, *supra* note 170, at 18.

196. Among useful pieces of information are:

. . . the child's name, date, and place of birth; the child's passport number and date and place of issuance; the abducting parent's name (and any alias), date and place of birth; the abducting parent's passport number and date and place of issuance; and the probable date of departure from the United States and entry into the foreign country, including flight information.

Gaw, *When Uncle Sam Needs to Come to the Rescue* 9 FAM. ADVOC. 24, 26 (1987).

197. *Id.*

198. Photographs of the child and/or abducting parent may assist the local authorities in their attempt to locate the abducted child. *Id.* at 27.

199. *Id.*

200. *Id.* at 27.

201. *Id.*

202. Dehart, *supra* note 180, at 23.

imprisoned. Additionally, the order should direct the noncustodial parent to carry out one or more of the following steps before visitation: 1) surrender to the court all passports during visitation, confirm that he or she holds no other passport, and certify that he or she will not attempt to replace the passports; 2) deposit with the court any passport that he or she holds for the child and certify that he or she will not obtain a replacement; 3) post a substantial bond conditioned upon timely restoration of the child to the custody of the other parent.<sup>203</sup> The attorney also should encourage the custodial parent to do one or more of the following: 1) request cancellation of the child's United States passport; 2) contact the State Department and request that it provide notification upon receipt of a request for replacement of the child's passport, and send a certified copy of the court order to the Department; 3) send to the United States embassy of the noncustodial parent's home country a certified copy of the court order and request that no passport or visa be issued to the child.<sup>204</sup>

Although the Hague Convention of 1980 is not yet accessible to United States parents due to pending legislation regarding the depositing of instruments, a parent and his or her attorney may take steps to deter abduction by the noncustodial parent and, once an abduction has occurred, to find the child, determine the applicable law, and obtain assistance of foreign counsel. In addition, various agencies and organizations offer services that facilitate the resolution of international custody disputes involving United States parents and children.

## VI. Conclusion

United States law and international law, as reflected in the UCCJA, the 1979 European Convention, and the Hague Convention of 1980, have evolved in response to the predominant issues arising from international custody disputes involving wrongful removal or retention of a child by a noncustodial parent. As a result of this evolution, legal mechanisms now exist for obtaining enforcement of a prior foreign custody decree and return of an abducted child. Unfortunately, in several countries such mechanisms are unavailable due to pending implementation. Until the treaties that hold these mechanisms are widely implemented, parents must grapple with existing law. In the interim, parents may combat the threat of abduction by utilizing deterrent measures and, when such a threat becomes a reality, enlisting the assistance of the various agencies and organizations

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203. *Id.*

204. *Id.*

that provide services related to locating an abducted child, determining applicable foreign law, and obtaining the aid of foreign counsel.

*Elizabeth C. McDonald*